Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local	)	
Competition Provisions in the	)	CC Docket No. 96-98
Telecommunications Act of 1996	)	
	)	
Inter-Carrier Compensation	)	CC Docket No. 99-68
for ISP-Bound Traffic	)	

TO: The Commission

COMMENTS OF SBC COMMUNICATIONS INC.

Robert M. Lynch
Roger K. Toppins
Michael J. Zpevak
Kathleen E. Palter
One Bell Plaza, Room 3014
Dallas, Texas 75202
214-464-5307

SBC Communications, Inc.
Pacific Bell
Nevada Bell
Their Attorneys

Filed Through ECFS
April 12, 1999

TABLE OF CONTENTS

SUMMARY[1]

SBC strongly urges the Commission to reject the misguided efforts of those parties that will undoubtedly attempt to convince the Commission to force-fit Internet-bound traffic into the Section 251/252 "mold" by allowing payment of terminating compensation for what is clearly not local traffic envisioned by those sections of the Act. There is no legal basis for mandatory terminating compensation or state-supervised negotiation and arbitration processes for this jurisdictionally interstate/interexchange traffic. The 1996 Act, as interpreted by this Commission, limits the application of such compensation to *intrastate and intraexchange* traffic that is transported to *and terminates* on another carrier's network within the same local area. Moreover, in its Declaratory Ruling, the Commission has rejected the primary theories upon which states have relied to impose the Section 251/252 regime upon Internet-bound traffic.

In addition, application of reciprocal compensation obligations to Internet-bound traffic would greatly endanger certain important Commission public policy goals embraced by the Act. Among other things, if the Commission were to establish a reciprocal compensation structure for Internet-bound traffic, competition in the local market would be thwarted instead of facilitated, as CLECs discovered that serving residential and business customers who are also ISP subscribers required them to pay reciprocal compensation. Further, the current bizarre and uneconomic market behavior would be exacerbated as CLECs actually begin to pay ISPs to attach to their networks in order that CLECs can receive windfall compensation payments. New entrants would appear in the

[1] Abbreviations utilized in this Summary are referenced within the text.

marketplace primarily to take advantage of receiving this windfall, rather than to compete vigorously for local exchange services with incumbent providers. Finally, these negative effects on the market would only serve to discourage expenditure and innovation in the area of new data technologies.

SBC urges the Commission to carefully evaluate alternative methods for carriers transporting Internet-bound traffic to recover their costs. An eminently suitable candidate would be a meet point billing strategy by which participating carriers could recover their costs equitably. SBC summarizes other proposals herein for the Commission's consideration, as well.

Beginning with its granting of the ESP access charge exemption in 1983, the Commission has demonstrated its sensitivity to the complexities of the interaction between telecommunications and enhanced/information services such as Internet services. It should retain jurisdiction over all Internet-bound traffic in order to ensure that competing interests – the integrity of the public switched telephone network, the competitive goals of both new and incumbent market players, and the rapidly expanding Internet marketplace of goods and ideas – are fairly and uniformly balanced across the nation.

Before the
Federal Communications Commission
Washington D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local	)	CC Docket No. 96-98
Competition Provisions in the	)	
Telecommunications Act of 1996	)	
	)	
Inter-Carrier Compensation	)	CC Docket No. 99-68
for ISP-Bound Traffic	)	

TO: The Commission

COMMENTS OF SBC COMMUNICATIONS INC.[2]

Pursuant to the Notice of Proposed Rulemaking[3] issued February 26, 1999 by the Federal Communications Commission ("Commission"), SBC Communications Inc. ("SBC") hereby comments on the Commission's proposed methods for determining appropriate inter-carrier compensation for ISP-bound traffic and related issues referenced in the Commission's NPRM.

Introduction

The Commission, in its NPRM, announces its intent to adopt a rule regarding inter-carrier compensation for ISP-bound traffic. The NPRM tentatively proposes two different compensation alternatives, both of which would be governed by inter-carrier

---

[2] SBC Communications Inc. files these Comments on behalf of its subsidiaries, Southwestern Bell Telephone Company, Pacific Bell, Nevada Bell and The Southern New England Telephone Company.

[3] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 and Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, *Declaratory Ruling in CC Docket No. 96-98* ("Declaratory Ruling") and *Notice of Proposed Rulemaking in CC Docket No. 99-68* ("NPRM"), FCC Docket No. 99-38 (rel. February 26, 1999).

agreements negotiated and arbitrated, either under Sections 251 and 252 of the 1996 Act or under a similar process developed and monitored by the Commission. SBC does not believe either of these approaches are proper or in the public interest, for the reasons set forth below.

First, although SBC agrees that local intercarrier compensation for transport and termination of local traffic between interconnected LECs is governed by Sections 251 and 252 of the 1996 Act, it is clear that these Sections do not apply to Internet-bound traffic, which the Commission has ruled is largely interstate. Furthermore, the tendency of states to find justification to impose reciprocal compensation obligations upon Internet-bound traffic if a Section 251/252 scheme is employed is reason enough to avoid this method. The imposition of local reciprocal compensation obligations on Internet-bound traffic is unlawful and dangerous to the policy goals of the Commission and the 1996 Act.

Instead, now that Internet-bound traffic has been found to be largely interstate, this traffic should be treated as such and the Commisison's meet point billing rules should apply when the interstate access ISPs receive through the ESP exemption is jointly provided. The ESP exemption would remain in place pursuant to the Commission's order; however, the adoption of a meet point billing method for the recovery of inter-carrier compensation for Internet-bound traffic (perhaps effected by modest modifications to the existing Part 69 access rules) would be an equitable solution. Inter-carrier compensation through meet point billing is a traditional, time-tested compensatory plan, would result in accurate allocation of revenues between carriers who collaborate to complete Internet-bound calls, and would alleviate the need for a structured negotiation and arbitration process altogether. While Part 69 rules apply only to ILECs, CLECs are permitted to collect equivalent charges when they provide interstate access to an ISP via the ESP exemption. However, CLECs must not be permitted to seek receovery from ILECs that serve the ISP's subscribers in lieu of seeking compensation from their customers, the ISPs.

<u>Issues put forth for comment</u>

In its NPRM, the Commission seeks comment on the following issues:

1. Two proposed alternative methods for determining inter-carrier compensation for ISP-bound traffic:

   (a) prospective governance of inter-carrier compensation for this form of interstate telecommunications traffic by interconnection agreements negotiated and arbitrated under Sections 251 and 252 of the Act, with resolution of disputes through arbitrations conducted by state commissions, appealable to federal district courts, pursuant to Section 252 (hereinafter referred to as "**Option 1**"); and

   (b) adoption of a set of federal rules governing inter-carrier compensation for ISP-bound traffic, pursuant to which parties would negotiate rates, terms and conditions applicable to delivery of interstate ISP-bound traffic in tandem with state interconnection negotiations. Resolution of disputes might be undertaken by the Common Carrier Bureau or other "federal arbitration-like process" (hereinafter referred to as "**Option 2**");

(2) Compensation alternatives for ISP-bound traffic that will further the Commission's public policy goals;

(3) Whether any federal rules adopted should apply to all intrastate and interstate ISP-bound traffic, or whether it is possible to technically segregate and discern interstate and intrastate ISP-bound traffic, in which case Commission rules could govern interstate ISP-bound traffic, leaving the intrastate ISP-bound traffic to state regulation;

(4) The implications of the various proposals regarding inter-carrier compensation for ISP-bound traffic on the separations regime;

(5) Whether the Commission has the authority to establish a binding arbitration process not subject to judicial review, and on the desirability of arbitration in general; and

(6) Whether and how Section 252(i) and MFN rights affect parties' ability to negotiate or renegotiate terms of their interconnection agreements.

Comments and Analysis[4]

1. The Commission should not adopt a compensation method that contemplates governance of inter-carrier Internet-bound compensation under Sections 251 and 252 of the 1996 Act (Option 1).

In Option 1, the Commission proposes that inter-carrier ISP-bound compensation be determined and governed prospectively by Section 251 and 252 interconnection agreements, with disputes resolved, for the most part, by state commission arbitrations.

[4] The NPRM sought no comment on the treatment of voice-over-Internet traffic (sometimes referred to as "Internet telephony"). SBC believes, generally, that such traffic is not entitled to the ESP exemption for its interstate access and, thus, requires treatment different from other Internet-bound traffic, and reserves its right to comment on that issue

The Commission believes that this method would help facilitate unified interconnection negotiations and resolution of disputes.

Although the goal of unified negotiations and dispute resolution is an admirable one, this proposed method, in this instance, is problematic for several reasons, and should not be adopted. First, any application of Sections 251 and 252 to Internet-bound traffic is contrary to governing federal law, since the Commission has declared the traffic largely interstate (and it is technically impossible to distinguish the few intrastate, Internet calls from the vast majority that are interstate or, at least, interexchange.) Second, adoption of a governance process under Sections 251 and 252 would virtually guarantee that local reciprocal compensation would be imposed upon LECs who jointly carry this traffic, yet the several theories under which state commissions (and some federal courts) have determined that reciprocal compensation for ISP traffic is appropriate are discredited by the Commission in its Declaratory Ruling.[5]

(a) As the Commission emphasizes in its Declaratory Ruling, Section 251 and Part 51 of the Commission's Rules do not govern inter-carrier compensation for Internet-bound traffic; accordingly, it would be improper to delegate governance of this traffic to Section 251/252 processes.

In the Declaratory Ruling, the Commission notes that both Section 251(b)(5) of the Act and Part 51 rules concern "inter-carrier compensation for interconnected *local*

---

in an appropriate proceeding.

[5] Hence, it is no surprise that the Commission also notes, in the Declaratory Ruling that, "We recognize that our conclusion that ISP-bound traffic is largely interstate might cause some state commissions to reexamine their conclusion that this traffic terminates at an ISP server." Declaratory Ruling at para. 27. The Commission also observed that "state commissions . . . are free not to require the payment of reciprocal compensation for [Internet] traffic." Id. at para. 26.

telecommunications traffic."[6] Based upon its ruling that Internet-bound traffic is non-local interstate traffic, the Commission concludes that, "the reciprocal compensation requirements of section 251(b)(5) of the Act and Section 51, Subpart H [Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic] of the Commission's rules do not govern inter-carrier compensation for this traffic."[7] Thus, if a state attempted to impose Section 251(b)(5)-mandated terminating compensation on *any* type of call that was other than purely intrastate and intraexchange in nature, that action would conflict directly with this concrete determination by the Commission, and, by definition, with governing federal law.

Furthermore, the legislative history of Section 251 makes it plain that Congress never intended *any* interconnection-related provision of Section 251 to be used in furnishing *any* interexchange service. The S.652 Conference Report states: "The obligations and procedures prescribed in [Section 251] *do not apply to interconnection arrangements* between local exchange carriers and telecommunications carriers . . . *for the purpose of providing interexchange service*."[8] Clearly, neither Section 251 nor Section 252 was intended to apply to the governance of compensation for any inter-carrier traffic other than that which both originates and terminates intrastate *and* intraexchange.

Finally, the rules for recovery of compensation for interstate access received by ESPs/ISPs were crafted by the Commission under its Section 201 authority, and specifically codified in Part 69. It would be highly improper to allow Section 251/252

---

[6] Declaratory Ruling at n. 87.

[7] Id.

[8] Conference Report on S. 652, Report 104-458, 104 Congress, 2d Session, at 117 (emphasis added).

processes to trump the access structure put in place by the Commission well over a decade ago pursuant to its proper statutory authority.

(b) It makes no sense to treat inter-carrier compensation for Internet-bound traffic, which is interstate, interexchange access traffic, under the Section 251/252 rubric.

A brief review of how inter-carrier compensation works demonstrates that the Commission's previous decision[9] not to subject interstate access calls to local reciprocal compensation obligations is well-supported and logical. First, in the case of a local call, the carrier that serves the originating end user receives a payment from that end user for the completion (origination, transport and termination) of the local call. When two LECs collaborate to complete a local call, the originating carrier receives the payment for the origination, transport and termination of the local call, but does not use its network to terminate the call. Section 251(b)(5) requires the originating carrier to compensate the terminating carrier for terminating the call; otherwise, the terminating carrier would not be compensated for the local use of its network.

In the case of an interexchange call, two LECs who jointly provide access to the IXC for completion of an interexchange call, meet point bill for these calls. In other words, both LECs bill access charges to the IXC as compensation for the use of their facilities by the IXC.[10] ISPs sell retail Internet service to customers just as IXCs sell retail long distance to their customers, and both collect a separate charge from their customers.

---

[9] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers, CC Docket No. 96-98, *First Report and Order* ("Local Competition Order")(rel. August 8, 1996) at para. 1034.

[10] *See* Figure 1, attached.

Like IXCs, the ISPs use facilities of LECs and CLECs to access their customers. ISPs, as access users should, in concept be billed in the same fashion.

However, the Commission has provided ISPs (as ESPs) with an access charge exemption.[11] In 1983, in order to facilitate the growth of a then infant industry, the Commission provided an exemption to paying access charges to ESPs including ISPs. The ESP exemption permits an ISP to purchase an intrastate business line for its interstate access instead of purchasing Part 69 switched access service. The Commission characterized the intrastate business line rate charged to the ISP as interstate access compensation,[12] and implemented the ESP exemption in its Part 69 rules by treating ISPs as end users. In addition to the business line rate, ISPs pay subscriber line charges (SLCs) and may pay special access surcharges.[13] Thus, the intrastate business line rate, SLCs and special access surcharges represent the interstate access compensation a LEC collects from the ISP for the interstate use of the network between the originating end user's premises and the ISP's premises.[14]

When two LECs jointly provide access to an ISP under the ESP(ISP) exemption created by the Commission, the LEC serving the ISP collects its interstate access compensation via the intrastate business line charge, SLC and Special Access Surcharge

---

[11] *See* In the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, *Memorandum Opinion and Order*, 97 FCC 2d 682, 711 (1983)("First Reconsideration Order"); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, *Order*, 3 FCC Rcd 2631, 2635 n.8, 2637 n.53 (1988).

[12] First Reconsideration Order at 715 ("Were we at the outset to impose full carrier usage charges or enhanced service providers…who are currently paying local business exchange service rates for their interstate access, these entities would experience huge increases in their costs of operation which could affect their viability.

[13] Declaratory Ruling at para. 5.

paid to it by the ISP, along with the PICC paid to it by the relevant IXC.[15] The originating LEC, on the other hand, receives no compensation for the access service it provides the ISP.[16] The intrastate local service rate paid by the ISP's subscriber does not compensate a LEC for interstate use of its network. The Commission, in its original decisions dealing with the ESP exemption, recognized that the (usually) flat local rate comprehends local service only and does not include any compensation for the interstate use of local services by ESP(ISP)s and others.[17] This Commission position debunks the notion that originating LEC access compensation is at least partially paid via the monthly local service charge paid to it by the ISP's customer, who originates Internet-bound calls. As a practical matter, it makes no sense to require a LEC serving an ISP customer to pay terminating compensation to the LEC serving the ISP.

(c) Sections 251 and 252 are inappropriately applied to Internet-bound traffic which is not, and has never been, "local."

There is a very real danger that adoption of Option 1 would result in serious misinterpretation by state commissions and others. In the Declaratory Ruling, the Commission states what must be a concern, in light of its clear holding that reciprocal

---

[14] *See* Figure 2, attached.

[15] .*See* Figure 3, attached.

[16] Id.

[17] This observation by the Commission is instructive in this proceeding, because it arose in the context of the "leaky PBX" problem – a phenomenon arising when "[a] facilities based carrier, reseller or *enhanced service provider* might terminate few calls at its own location and thus would make relatively heavy interstate use of local exchange services and facilities to access its customers." First Reconsideration Order at 712 (emphasis added). The Commission also noted that this "leaky PBX" traffic was far more significant in amount than might otherwise be believed, and that it represented a real problem that needed to be addressed via some method to recover access compensation for local exchange carriers. Id.

compensation methodologies do not apply to any traffic but intrastate/intraexchange local traffic:

> [W]e note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.[18]

In fact, at least one state commission, apparently disregarding the Commission's Declaratory Ruling, has already held that ISP traffic was treated as local by the industry (and the Commission) for many years, and that originating LECs are therefore charged with notice that reciprocal compensation provisions in interconnection agreements that reference "local traffic" necessarily include ISP traffic.[19]

But any attempt to characterize Internet-bound traffic as local in nature must fail, for at least three reasons. First, and most importantly, the Commission's passing observation that it previously treated this traffic as local conflicts directly with express Commission holdings elsewhere within the Declaratory Ruling. At paragraph 16, the Commission unequivocally rejects the CLEC argument that their traffic must be "local," because ISPs receive the benefit of the "ESP exemption," and thus can use local exchange service instead of interstate access to originate and terminate their interstate traffic. The Commission states,

> The fact that ESPs are exempt from access charges and purchase their PSTN [Public Switched Telephone Network] links through local tariffs does not transform the nature of traffic routed to ESPs. . . . ESPs in fact use interstate access service.[20]

[18] Declaratory Ruling at para. 25.

[19] *See*, In re: Emergency petitions of ICG Telecom Group Inc. and ITC Delta Com Communications, Inc. for a Declaratory Ruling, Dkt. 26619, *Order*, Alabama Public Service Commission (rel. March 4, 1999).

[20] Declaratory Ruling at para. 16.

As the Declaratory Ruling underscores, it is the endpoint-to-endpoint nature of the communication that determines its jurisdictional status, and in the case of Internet communications that status is nearly always at least interexchange, if not interstate or international.[21] Second, the Commission carefully qualified its observation as *not* constituting any kind of ruling on that issue ("to date the Commission has not adopted a specific rule governing the matter"[22]). Third, the observation is obviously intended to be no more than a mere notation made in passing ("we *note*;" "*if* applied;" "would *suggest*").

Furthermore, the Commission's position that states may lawfully assess reciprocal compensation for ISP-bound traffic under Sections 251 and 252 based upon a LEC's "voluntary" participation in an interconnection agreement providing for such compensation cannot "make" this traffic "local." In its Declaratory Ruling, the Commission takes the position that state commissions may enforce reciprocal compensation against LECs if they are party to interconnection agreements in which they "voluntarily agreed" to pay reciprocal compensation for ISP-bound traffic.[23] Even assuming a LEC "voluntarily agreed" to pay reciprocal compensation for ISP-bound traffic in its interconnection agreements, the Commission's position, in light of other, clear holdings in the Declaratory Ruling, cannot be interpreted to "make" Internet-bound traffic "local" in nature.

Furthermore, the Commission, by its assertion that LECs should be bound by reciprocal compensation arrangements they might have agreed to in interconnection agreements, effectively bases the characterization and treatment of a type of traffic upon the behavior of carriers, rather than upon a proper technical and legal analysis. The Commission indicated that these behaviors might include:

(a) The conduct of the parties pursuant to agreement

---

[21] Id. at para. 18.
[22] Id. at para. 25.

However, in the context of its interconnection agreements, SBC has clearly indicated via its conduct that it believed this usage was interstate, not local, and thus not subject to local reciprocal compensation[24]

(b) The method by which LECs chose to serve ISPs -- out of intrastate or interstate tariffs -- and how the revenues for these services were counted -- as intrastate or interstate.[25]

ISP connections are charged out of intrastate tariffs as directed by the Commission in the context of the ESP access charge exemption and resulting modification of Part 69 Rules. Again, as the Commission stated in Paragraph 16 of its Declaratory Ruling:

> *The fact that ESPs are exempt from access and purchase their PSTN links through local tariffs does not transform the nature of traffic routed to ESPs.*

(c) Whether incumbent LECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation.[26]

SBC does segregate Internet-bound traffic, both to assign it to the interstate jurisdiction and to remove it from local reciprocal

---

[23] Id. at paras. 22-24.

[24] For example, in 1997, SBC sent a written notice to local service providers with whom it was negotiating or with whom it had interconnection agreements. In the notice, SBC informed the providers that the Commission's exemption of ISPs did not change the interstate jurisdiction of Internet-bound traffic, and that SBC viewed the traffic as originating interstate access traffic to which reciprocal compensation obligations did not apply. The notice further stated that SBC would not seek or pay reciprocal compensation for interstate or intrastate interexchange traffic, including ISP-bound traffic.

[25] Declaratory Ruling at para. 23..

[26] Id.at para. 24.

compensation billing.[27] *By its actions, SBC clearly indicated its belief that Internet-bound traffic is interstate, not local, and never voluntarily agreed to pay local reciprocal compensation for this usage.*

In any case, the concept of determining the regulatory nature of telecommunications services based upon carrier behavior was soundly rejected by the D.C. Circuit Court of Appeals, albeit in the context of dark fiber regulation, in 1994. Southwestern Bell Telephone Company v. FCC, 19 F.3d 1475 (D.C. Cir. 1994). The Court held that the Commission had unlawfully deemed ICB offerings of dark fiber by Southwestern Bell and other RBOCs to be admissions that the services were common carrier offerings subject to the Commission's regulatory authority.[28] This "short-circuiting" by the Commission of any analysis of the actual characteristics of the service offerings resulted in an impermissible "per se rule that a filing of a piece of paper with the FCC constitutes an offer of common carriage."[29]

Although the facts of the Southwestern Bell decision are different, its teaching is applicable to the instant proceeding. It is improper for the Commission to make a regulatory determination based merely upon the behavior of carriers. If the Commission's reasoned analysis leads it to determine that ISP-bound traffic is largely interstate in nature, and that it does not terminate on CLEC or ISP facilities, then its conclusions should not be nullified by the fact that LECs may or may not have acquiesced in contractual terms that treat this traffic as local and terminating.

---

[27] The Commission acknowledges this treatment by SBC in the Declaratory Ruling at paragraph 23, n. 76.

[28] 19 F.3d at 1484.

[29] Id.

(d) The Commission has discredited virtually all of the theories under which state commissions previously held that reciprocal compensation was appropriate for ISP-bound traffic.

The theories under which state commissions have found reciprocal compensation for ISP-bound traffic appropriate, and the Commission's rejection of them, are discussed below.

(1) The "Two-Call" Theory

The Declaratory Ruling very clearly rejects the theory that there are in reality two different calls involved with any Internet communication – a local telecommunications call from the calling party to the ISP's node, and then an interstate information service call from there on to the Internet, stating unequivocally that there is only one call which, for jurisdictional purposes, is measured from the physical point of the calling party to the ultimate physical destination point(s) on the Internet.[30]

(2) The "ISPs as End Users" Theory

This theory, which concludes that, since ISPs must be end users like ESPs, calls coming into an ISP must by definition "terminate" there, despite the fact that the ISP nearly always routes the calls on to the originating caller's desired Internet website. The Declaratory Ruling, however, states definitively that such calls do not terminate at the ISP for purposes of determining the jurisdictional nature of such calls, despite the ISPs' status as "end users" for purposes of obtaining the Commission's access charge exemption.[31]

[30] Declaration Ruling. at paras. 12-15.
[31] Id. at para. 16.

(3) The "Local Exchange Service" Theory

The third previous basis for state decisions requiring reciprocal compensation is the theory that CLEC delivery of ISP traffic is just another form of "local exchange service," subject to Section 251 terminating compensation. The Commission dismissed this argument, noting that it "consistently has characterized ESPs as 'users of access service'" despite having treated them as local exchange service users "for pricing purposes" only.[32]

(4) The "CLEC In-State Equipment Location" Theory

CLECs also attempted to obtain a Commission ruling that ISP-bound calls are local by arguing that all of any given CLEC's equipment is located within a single state.[33] The Commission flatly rejected this notion, stating: "The fact that the facilities and apparatus used to deliver traffic to the ISP's local servers may be located within a single state does not affect our jurisdiction," noting a long line of cases so holding.[34]

(5) The "ISPs-Answer-The-Call" Theory

Finally, the Commission summarily rejected CLECs' attempts to convince regulators that an Internet communication is a "call," terminating at the ISP when the ISP "answers" the incoming "call" from the CLEC, and that Section 252(d)(2) requires only that reciprocal compensation be used to recover the costs of transporting and terminating a "call."[35] The Commission noted: "We find that this argument is inconsistent with

---

[32] Id. at para. 17.
[33] Id. at para. 12.
[34] Id. at paras. 10-12.
[35] Id. at para. 14.

Commission precedent . . . holding that communication should be analyzed on an end-to-end basis, rather than by breaking the transmission into component parts."[36]

(e) Internet-bound traffic cannot be handled by the states in any way under Sections 251 and 252 because it is interstate and does not terminate at a CLEC or ISP.

Section 251(b)(5) imposes upon all LECs the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Section 252(d)(2)(A)(i) provides:

> For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission *shall not* consider the terms and conditions for reciprocal compensation to be just and reasonable *unless* –
>
> > (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport *and termination on each carrier's network facilities* of calls that originate on the network facilities of the other carrier. (emphasis added)

In its Declaratory Ruling, the Commission has now made clear that Internet-bound calls are not properly viewed as "terminating" at the ISP's node, stating:

> [T]he communications at issue here do not terminate at the ISP's local server, as CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically at a Internet website that is often located in another state.[37]
>
> The Commission reaffirmed its long-standing policy of determining the jurisdictional nature of communications "by the end points of the communication,"[38] and found that the end point of an Internet-bound call is *not* the ISP, but the ultimate Internet website destination.[39]

[36] Id. at para. 15.
[37] Id. at para. 12.
[38] Id. at para. 10.
[39] Id. at para. 12.

Furthermore, no party has yet been able to show that it is technically feasible to identify separately each portion of any Internet user's session on an end-to-end basis, or distinguish between those few communications that may actually end at the ISP's node on the one hand, and the great majority of communications that the ISP passes along to interexchange, interstate and/or international website destinations on the other hand. Thus, under current governing federal law, a state commission may not impose Section 251(b)(5) terminating compensation obligations upon ILECs for delivering Internet calls to CLECs who then deliver the calls to an ISP. Section 252(d)(2)(A)(i) provides expressly that a state may *only* find such compensation just and reasonable where it is required for the CLEC to recover its costs of *terminating* calls received from the ILEC, and an ILEC cannot lawfully be required to pay terminating compensation where it cannot be shown that the calls originate *and terminate* within the same exchange. Until such time as a CLEC can prove which ISP-bound calls actually *end* at the ISP's node, or remain physically intraexchange, compulsory[40] terminating compensation is improper for such calls under either Section 251(b)(5) or Section 252(d)(2)(A)(i).[41]

Simply put, there is no statutory authority for states to impose reciprocal compensation duties upon LECs other than in full accordance with the terms of Section 252(d)(2)(A)(i). In its Declaratory Ruling, the Commission expressly qualified state regulatory power with the caveat: "so long as there is no conflict with governing federal

[40] Of course a company could, if it chose, voluntarily and expressly agree to local reciprocal compensation for this traffic under Section 252(a) of the Act.

[41] *See* Local Competition Order at para. 1034 ("We conclude that section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area [i.e., exchange])" (emphasis added).

law."[42] The "governing federal law" now is that Internet-bound calls do not terminate at the end of the CLEC's network (i.e., at the ISP's node). Section 252(d) of the Act only allows states to impose reciprocal compensation charges for recovery of costs incurred to *terminate* calls on the second carrier's network; therefore, Section 252(d)(2)(A)(i) compensation -- by its own express terms -- cannot apply to such calls. Section 252(c)(2) of the Act limits state authority to resolve arbitration issues and establish rates, saying, "a State commission *shall* . . . establish *any* rates . . . according to subsection (d). 47 U.S.C. §252(c)(2) (emphasis added). Consequently, adoption by the Commission of Option 1 would allow state action that is expressly disallowed by the language of the 1996 Act.

2. Payment of local reciprocal compensation is at odds with the Commission's public policy goals and harms the public interest. The Commission must evaluate alternative means of recovery of Internet-bound traffic costs.

In Paragraph 33 of the NPRM, the Commission seeks comments regarding alternative proposals that will advance the Commission’s policy goals, including the goals of insuring the broadest possible entry of efficient new competition, eliminating incentives for inefficient entry and irrational pricing schemes and providing to consumers as rapidly as possible the benefits of competitive and emerging technologies.

Applying local reciprocal compensation to this interstate access usage is poor public policy, having at least the following negative effects on the marketplace:

The application of this form of compensation

[42] Declaratory Ruling at para. 26.

(a) retards local competition because CLECs will be unwilling to serve local end users who are also ISP subscribers because the CLECs may have to pay reciprocal compensation;

(b) results in inefficient market entry solely for the purpose of receiving_windfall terminating local compensation;

(c) results in irrational pricing schemes in which CLECs may actually pay ISPs to hook up to CLEC network so the CLECs can receive windfall compensation payments; and

(d) may impede deployment of new data technologies.[43]

(a) Allowance of the reciprocal compensation method will retard local competition.

[43] Additional information was provided to the Commission in an Ex parte by SBC dated May 13, 1998, Tab 3.

The 1996 Telecommunications Act was enacted to generate widespread competition in the toll and local residential and business markets. However, if compulsory reciprocal compensation payments for Internet-bound traffic are instituted, CLECs will be disincented from being the local exchange telecommunications providers for residential or business customers who are also ISP customers (i.e., who obtain Internet service from an ISP) because of the financial losses that will be incurred due to payment of (or potential payment of) reciprocal compensation. Consequently, payment of reciprocal compensation for Internet-bound traffic, in effect, poses a barrier to local residential and business competition and defeats the purpose of the 1996 Act.

It is clear that if local terminating compensation is mandated for ISP-bound traffic, any new competitive local company would not willingly replace the incumbent LEC as the customer's local provider and in fact (because it has no carrier of last resort obligation) can refuse to provide service because of the significant costs that it would incur if that customer has ISP service. On the other hand, the LEC, which does have carrier of last resort obligations, must serve the customers even it suffers a financial loss from the terminating compensation requirement. It is also unlikely that the CLEC would be willing to serve these customers even if it also had the ISP connected to it because of the likelihood that the ISP could be incented to disconnect and reconnect its service to another CLEC.

As this example shows, mandating the payment of local terminating compensation, even at a very low per minute rate, for any interstate Internet usage does not further competitive entry, but is in fact, a barrier to local competition for residential and business customers. This is not the competitive local exchange market that Congress envisioned when it passed the 1996 Act.

(b) Mandatory reciprocal compensation will motivate inefficient market entry, promote irrational economic behavior and discourage technological innovation.

Not only does requiring local reciprocal compensation hinder the development of competition in the local exchange market, but it causes significant economic distortions in the ISP industry and discourages technological advances and improvements.

As required by the Commission, CLECs are entitled to line, SLC and special access surcharge receive the same revenue streams ILECs collect under the Part 69 rules, i.e., local business revenue from ISPs to allow ISPs to connect to the network. However, if the Commission allows the institution of a reciprocal compensation methodology, CLECs would also inappropriately receive local compensation from incumbent LECs for Internet-bound traffic and the LEC serving the ISP's subscriber would not only be uncompensated for the use of its network, it would also incur additional expenses for reciprocal compensation payments.. This substantial and inappropriate inflow of compensation revenues can lead to competitive abuses. For instance, in order to receive more compensation payments, CLECs, could begin (and in some cases have begun) to entice ISPs to connect to their network by using the reciprocal compensation payments to pay ISPs to connect.[44] This situation diminishes rather than enhances competition for the provision of service to ISPs because LECs are unable to effectively compete for ISPs as

[44] Further information on this subject was provided to the Commission in an Ex parte by SBC on May 13, 1998, Tab 3.

customers. This situation may also motivate ISPs to uneconomically select switched interconnection when other more sound technologies like DSL would better serve their customer needs. This serves as a disincentive to deploy newer and better technologies and results in increasing congestion on the Public Switched Telephone Network, which conflicts with one of the Commission's traditional policy goals – to promote efficient use of the network..

Consequently, the public interest is best served by not instituting reciprocal compensation as a method for Internet-bound traffic, except as voluntarily agreed to by a LEC.

(c) The Commission's public policy goals would be well-served by evaluation of alternative cost recovery mechanisms for Internet-bound traffic – including a meet point billing method.

Accordingly, the Commission must evaluate other alternatives for the recovery of interstate use of LEC networks when the ESP exemption is jointly provided to ISPs. SBC advocates a meet point billing method that permits both carriers to be compensated for the interstate use of their networks. Since the theory behind meet point billing is that each carrier bills the person receiving its service, this compensation structure could be designed in a number of ways.

The LEC serving the ISP could continue to recover its access compensation directly from the ISP through its intrastate business line charges and interstate SLCs, while the LEC serving the ISP's subscriber could be permitted to

(a) bill the ISP a surcharge for the interstate use of its network. By way of example, this surcharge could be an extension of the special access surcharge described in Part 69.5(c) and 69.115;[45]

(b) bill the CLEC for access compensation; or

(c) bill the ISP subscriber for access compensation.

If the Commission determines that the meet point billing method is not workable or otherwise acceptable, it should consider recovering the subsidy to the ISPs (resulting from the access exemption) for internet bound traffic costs (net of the local business revenue received for the ISP connection to the network) from the federal Universal Service Fund.[46]

---

[45] The special access surcharge was established to act as a surrogate for the access revenue forgone as a result of the "leaky PBX" phenomenon, discussed above. Leaked traffic generally occurs when a user interconnects local exchange services with private line services. The surcharge is applied to the user's private line services on a per-voice grade equivalent channel basis for those private line services that customers certify are capable of leaking. Customers often configure their services to "leak" as a way to avoid switched access charges associated with the interstate use of the PSTN. However, in the case of ISPs, the surcharge should always apply because the Commission, through the ESP exemption, has endorsed a service configuration that is meant to "leak". Therefore, in spite of the exemption from switched access charges, the Commission determined that special access surcharges should apply to ISPs to act as a surrogate for the switched access charges avoided through the exemption.

Part 69.115(b) requires the surcharge to be a reasonable approximation of the switched access charges that would have been paid for the use of common lines, end office switching and transport facilities an ISP needs to access its subscriber. When the telephone company does not provide the private line service to which a surcharge can be applied, Part 69.115(d) permits a surcharge to be developed that can be applied to the local exchange services an ISP uses to "leak" traffic. The Commission recognized (in 1983) that the LEC providing local exchange service to an ISP through the ESP exemption might not always be the ISP's provider of private line services. Part 69.115(d) provides an adjustment to the Commission's rules a LEC needs to continue to be compensated for the interstate use of its network.

[46] In its analysis of Internet usage, the NARUC Working Group, in their April 1998 Internet report), stated: "The FCC decision [to exempt ESPs from access charges] means ESPs (including ISPs) may purchase services from ILECs under the same intrastate tariffs available to end users. They pay business line rates and the appropriate subscriber line

3. A federal negotiation and arbitration process (Option 2) is unnecessary and creates a risk of inconsistent treatment.

The second alternative method set forth by the Commission in the NPRM is that it adopt a set of federal rules governing inter-carrier compensation for ISP-bound traffic pursuant to which parties would engage in negotiations concerning rates, terms and conditions applicable to delivery of interstate ISP-bound traffic, with some sort of dispute resolution process created to deal with disagreements.

SBC agrees with only the first part of this proposal — that the Commission promulgate rules to govern intercarrier compensation for ISP-bound traffic. If the rules are fair and reasonably simple to administer, there is no need for negotiation between the parties. Furthermore, launching inter-carrier compensation issues into a "parallel universe" with interconnection negotiations between the parties that are largely subject to state overview invites continued confusion and discord over the treatment of this traffic indefinitely.

4. Rather than attempt to establish a dual methodology for treatment of Internet-bound traffic, the Commission should retain jurisdiction over all Internet-bound traffic and establish a unified approach, because of the impracticality of segregation and identification of inter- versus intrastate Internet-bound traffic.

Total ISP Internet access usage can be measured by a number of methods. Each method requires identifying the ISP Internet number called by the end user and all

---

charge rather than interstate access rates. Business line rates are significantly lower than equivalent interstate access charges because of separations allocations, pervasive flat and message rates for local business service, and the per-minute rate structure of access charges. On the other hand, interexchange carriers (IXCs) at least for now must pay access charges for similar connections to the PSN…The access charge exemption is a preference for a certain class of users [ISPs] of the public switched network…A preference acts like a subsidy to a certain group…" NARUC Report at 15 (footnotes

Internet-bound usage associated with that number. Initially, Internet-bound traffic appears (like Feature Group A traffic) to be “local” in nature because only seven digits are dialed as an access code. As SBC is able to identify such traffic as Internet-bound, the calls, their usage and consequently, their costs are being removed from the local jurisdiction. SBC is making the corresponding adjustment to its jurisdictional traffic volumes to treat such usage and the related costs as interstate for jurisdictional allocation purposes and use in its internal systems.[47]

However, given the nature and current uses of the Internet, it is not possible to identify or separate most of this traffic by jurisdiction because:

> 1. Like Feature Group A service, the ISP's subscriber does not dial 1+ or 0+, but normally dials only seven digits to reach an ISP. The dialed telephone number acts as an access code to route the Internet-bound traffic to the ISP. Again, like Feature Group A, only the dialed telephone number is known to the LEC serving the ISP's subscriber. Consequently, the jurisdiction is not readily identifiable or measurable because the LEC never receives the actual destination from the ISP's subscriber. SBC believes that there are technical and practical limitations that impact an ISP's ability to determine and measure the jurisdiction of Internet-bound traffic. In the Internet world, instead of dialed digits being used to determine a destination, the Internet relies on mechanisms like world wide web addresses for delivery. ISPs would literally have to examine the packets containing the website addresses sent by their subscribers as a first step in

---

omitted).

[47] Further information regarding this process was provided to the Commission in a SBC Ex parte dated February 23, 1998.

determining the destination. An ISP most likely will not even be aware of the geographic location in which the information its subscriber seeks is ultimately stored. Most importantly however, is the inability to segregate an interstate minute of use from an intrastate minute of use. In the case of the Internet, an ISP's subscriber can literally access international, interstate and intrastate locations simultaneously,[48] which represents a significant change from the traditional use of the PSTN. Each minute of use on the PSTN associated with Internet traffic can no longer be categorized as interstate or intrastate.

Aside from the technology and advanced capabilities of the Internet, the Commission should consider assuming complete jurisdiction to carry out its policy obligations described in Section 230(b)(2) of the Act. Congress clearly intended that development of the Internet should proceed, unfettered by Federal and State regulation. Rather than assuming the role of Internet police for traffic that has already been found to be largely interstate and which cannot be jurisdictionally segregated due to underlying

---

[48] As the FCC Office of Plans and Policy ("OPP") explained, in a working paper issued last year, "…because Internet is a dynamically routed, packet-switched network, only the origination point of a Internet connection can be identified with clarity. Users generally do not open Internet connections to 'call' a discreet recipient, but access various Internet sites during the course of a single connection…One Internet 'call' may connect the user to information both across the street and on the other side of the world." FCC OPP working Paper No. 29, *Digital Tornado: The Internet and Telecommunications Policy*, March 1997, by Kevin Werbach, page 45. The OPP working paper also concluded that Internet traffic has "no built-in jurisdictional divisions". *See also* Report to Congress on Universal Service, CC Docket No. 96-45, (rel. April 10, 1998), para. 64 ("The Internet is a distributed packet-switched network, which means that information is split up into small chunks or 'packets' that are individually routed through the most efficient path to their destination. Even two packets from the same message may travel over different physical paths through the network. Packet switching also enables users to invoke multiple Internet services simultaneously, and to access information with no knowledge of the physical location of the server where the information resides.")

technology and use reasons, the FCC should find that as a practical matter Internet traffic is presumptively interstate.

2. Numerous interconnected companies including LECs, CLECs, IXCs and ISPs may be involved in handling the ISP Internet call which may be terminated anywhere in the United States or the world. Consequently, without significant administrative expense to develop a jurisdiction reporting, auditing and verification procedure for all of the parties handling the calls, or significant investment in measuring equipment by all of the parties, the end-to-end jurisdiction of the call cannot be determined. Even if reporting or measuring is attempted, it may be virtually impossible to measure, or determine appropriate reported jurisdictional usage because of the ability of the Internet to, on a real time_basis, deliver calls (Internet, intrastate or international) simultaneously.

For these reasons, determining the jurisdiction of ISP Internet access usage and segregating out of it local, intrastate intraLATA toll and interstate and intrastate access may be nearly impossible. Even if the Commission had jurisdiction over ISPs, and could order them to track the jurisdiction of all calls, it would be virtually impossible for ISPs to comply because the end user may "visit" many different sites during a single connection to the Internet.[49] This access usage is interstate because it is jurisdictionally inseverable.

[49] In FCC Office of Plan and Policy Working Paper No. 30, August 1998, entitled *Internet Over Cable: Defining the Future in Terms of the Past,* by Barbara Esbin, the Commission discusses the major services (points of termination) that an end user can use in one continuous call using the telecommunications access facilities of LECs and CLECs and the Internet facilities and information services made available by the ISP: "Once one

SBC believes that it is unlikely that a feasible end-to-end measurement technology will be available anytime in the near future that will enable all companies and carriers which provide facilities to transmit Internet bound calls to jurisdictionally identify the usage. Consequently, SBC recommends that until such a technology is identified, tested and recommended for use by a Joint Board, that the Commission retain jurisdiction over all Internet-bound usage.

5. Implications of the Declaratory Ruling for the Jurisdictional Separations Process

Because Internet-bound traffic is "largely interstate,"[50] and is jurisdictionally inseverable all Internet-bound traffic is under the Commission's jurisdiction. From a separations perspective there are three main issues:

1. Measurement of Internet-bound traffic – As noted above, and as is undisputed, the specific jurisdiction of Internet traffic is not realistically subject to measurement and severance. In this proceeding, rather than making a pronouncement as to the proper jurisdictional treatment for ISP

---

has access to the Internet, there are a variety of different methods of communication and information exchange over the network, which are themselves constantly evolving. Although constantly 'evolving,' the most common methods of communications on the Internet (as well as the major online services) can be roughly grouped into six categories: (1) one-to-one messaging (such as 'e-mail'); (2) one-to-many messaging (such as 'listserv'); (3) distributed message data bases (such as 'USENET newsgroups'), and (4) real time communication (such as 'Internet Relay Chat'); (5) real time remote computer utilization (such as 'telnet'), and (6) remote information retrieval (such as 'ftp', 'gopher', and the 'World Wide Web').' Various types of information, including text, data, computer programs, sound, visual images (i.e., pictures), and moving video images can be transmitted by most of these methods. Each of these six categories involves one of two basic uses of the Internet. 'First, an individual who obtains access to the Internet can correspond or exchange views with one or many Internet users. Second, a user can locate and retrieve information available on other computers'." OPP Working Paper No. 30 at 22 (footnotes deleted).

usage, the Commission appears to be simply recognizing that the usage, because of the seven digit local dialing pattern used by the end user to access the Internet, will, without action taken by a LEC, be assigned by separations measurement systems to the local category. However, given an appropriate measurement identification process for Internet traffic in total, this usage can (like FGA) be identified, removed from the local classification and be properly assigned to interstate.

Throughout this period, beginning in 1983, when the Commission initiated its ESP/ISP exemption, until the mid to late 1990s, the amount of Internet-bound interstate access traffic was relatively small. SBC estimates that until the mid- to late 1990s Internet-bound usage had only grown to less than 5% of its interstate usage. However, in the late 1990s, for a variety of reasons[51] Internet-bound access usage began to substantially grow. Fortunately, this growth coincided with the development of measurement techniques and tools which enabled the LEC to identify, distinguish Internet-bound traffic from local traffic and properly assign Internet-bound traffic to the interstate classification.

2. Growth of Internet-bound usage -- The significant growth of Internet-bound traffic is assigning a larger and larger share of traffic-sensitive costs

[50] Declaratory Ruling at para. 18.

[51] Accessibility of home computers to more Americans, publicity about the Internet and public policy promoting the Internet; useful websites and accessibility of information on the Internet; growth of chat lines, Internet home shopping and most importantly, flat rate pricing by ISPs to the end users for Internet access.

(local switching and transport) to the interstate jurisdiction. Based on usage identified so far, SBC estimates that SWBT is assigning over $60 million in costs to the interstate jurisdiction. This assignment of costs will likely continue to grow because of the continuing explosive growth of Internet-bound access use of the network.

SBC believes that the current Separations Joint Board should evaluate the expected nationwide impact of the jurisdictional assignment of Internet-bound usage and traffic-sensitive costs to the intrastate jurisdiction.

3. Loop Costs -- Loop costs are now allocated based on a 25% gross allocator to interstate. Their jurisdictional assignment is unaffected by the reassignment of ISP-bound usage from local to interstate. Although, SBC believes that the current gross allocator is appropriate, the Separations Joint Board may wish to evaluate its level.

Although the Commission, in its NPRM, flatly states that "both the costs and revenues associated with [ESP/ISP] connections will continue to be accounted for as intrastate,[52] the entire separations structure, and the legal authority supporting it, dictates otherwise. Jurisdictional assignments in the separations regime are not merely a matter of accounting or administration. Because the Communications Act established dual state and federal regulation of telephone service, it also established the concept of separations to handle the inevitable tensions arising from dual jurisdiction.[53] Accordingly, if LEC facilities are used for interstate service — like Internet-bound traffic — cost must be

[52] NPRM at para. 36.

[53] Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 375 (1986); 47 U.S.C. § 221.

properly assigned to the interstate jurisdiction. SBC, has adhered to this important requirement, where practicable.

6. The Commission does not have the authority to establish binding arbitration procedures not subject to judicial review – nor is such a remedial process necessary.

If, as SBC urges in these Comments, the Commission adopts an inter-carrier compensation method that does not involve negotiation or arbitration, there is no need for the Commission to consider adopting a binding arbitration process. For purposes of completeness, however, SBC provides a brief response to the Commission's request for comments on this issue.

Arbitration, along with other alternative dispute resolution methods, is often viewed favorably because it is perceived as a quicker, more efficient way to resolve disputes than administrative or judicial proceedings. Binding arbitration not subject to judicial review can be a useful tool in resolving disputes between contracting parties who have agreed to have their disagreements settled in this fashion.However, SBC urges the Commission to refrain from establishing binding arbitration procedures relative to this intercarrier compensation issue for two important reasons. First, the Act does not permit the Commission to abdicate its authority to such a process without appropriate administrative and judicial review. The Commission's authority to delegate its adjudicative and regulatory powers are strictly prescribed by Congress in the Act[54] and does not include the power to defer interstate compensation issues to binding arbitration. In fact, the Act specifically sets forth that any order issued by the Commission itself, or pursuant to a § 5(c) delegation, is appealable, either directly to the Court of Appeals for the District of Columbia Circuit[55] or to federal district court.[56] As a federal administrative agency, it is

[54] *See, e.g.*, 47 U.S.C. § 5(c).
[55] 47 U.S.C. § 402 (b).
[56] 47 U.S.C. § 405**.**

the Commission's duty to effect the will of Congress as expressed by the statute that created it.[57] As administrative and judicial review are required by the statute from which the Commission derives its authority, even for matters which are properly delegated, creation of a binding arbitration scheme to govern inter-carrier compensation issues would not be proper under the Act. Second, even if the Commission was empowered to create such a process, resort to a tertiary dispute resolution process, such as that set forth in Option 2, will be unnecessary if the Commission rules authoritatively and correctly on this important issue such that parties incurring costs for carriage of Internet-bound traffic are compensated fully and fairly under the guidance of the Commission.

7. "Most-Favored-Nation" rights must not be allowed to be misused to create "perpetual" agreements that incumbent LECs and regulatory authorities can never renegotiate or modify to effectuate important business and policy goals.

As the Commission notes in the NPRM, Section 252(i) MFN rights can be misused to allow CLECs to successively opt into a term or terms from an existing interconnection agreement such that the term or terms never expire and are binding on the incumbent LEC for an indeterminate length of time with no opportunity for renegotiation.[58] This result cannot have been intended by Congress when it crafted Section 252(i) because it has at least two significant and harmful effects.

First, and most obviously, business needs and the marketplace itself change over time, rendering many contractual terms undesirable or unworkable in their originally negotiated form. Under normal circumstances, parties are free to agree to renegotiate terms during the life of an agreement, or to allow agreements to expire and then modify them on a going-forward basis, either with the same parties, or with new contracting partners. If Section 252(i) MFN rights are construed to allow CLEC after to CLEC to

---

[57] *See, e.g.*, Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976).

opt into terms in existing agreements for successive multi-year terms, potentially *ad infinitum*, important business and marketplace interests will be severely compromised.

Second, as at least one panel of state arbitrators has recently pointed out, this "perpetuation" of contracts or contract terms is contrary to public policy as well. This "leapfrogging" of contract dates will prevent state commissions from applying refinements to policy to relationships between incumbent LECs and market entrants, which would normally occur as contracts or contract terms expire.[59]

To avoid these harmful effects, parties must be free to negotiate reasonable expiration dates that would apply to an entire agreement, including MFN'd terms. As a default position, if parties could not agree, the expiration date of the existing "source" agreement should apply to each MFN'd term taken from that contract. This position is supported both by Section 252(i) and by Commission Rule 51.809. Both the statute and the rule indicate that the MFN'd term is available only upon the same terms and conditions as the original term. In addition, Rule 51.809 specifically states that individual interconnection, network element or service arrangements are available for MFN'ing for a "reasonable period of time after the approved agreement is available for public inspection under Section 252(f) of the Act." The Rule, though not specific about the exact length of the "reasonable period of time" contemplates that there be a "cut-off" of the ability to MFN into terms.

---

[58] NPRM at para. 35.

[59] Memorandum dated June 19, 1998 from Arbitrators Howard Siegel and Meena Thomas to Commissioners Wood, Walsh and Curran, Public Utility Commission of Texas, p. 1, Docket No. 17922 (<u>Petition of Waller Creek Communications, Inc. for Arbitrations with Southwestern Bell Telephone Company</u>).

Conclusion

As the Commission has clearly acknowledged its jurisdiction over Internet-bound traffic, it should now accept responsibility for crafting an equitable method for compensating local exchange carriers for transmission of this traffic. Relegating this important, complex task to the local processes established by Sections 251 and 252 of the Act is improper and not in the public interest. The competitive goals of the 1996 Act, the policies of this Commission, the growth of the Internet and technology, and the business interests of all carriers are best served by the Commission's careful evaluation of other compensation methods, including the meet point billing method proposed by SBC in these Comments.

Respectfully submitted,

SBC COMMUNICATIONS INC.

/s/ KE Palter

By: _________________________

Robert M. Lynch
Roger K. Toppins
Michael J. Zpevak
Kathleen E. Palter

One Bell Plaza, Room 3014
Dallas, Texas 75202
214-464-5581

April 12, 1999